STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

LIGHTHOUSE COVE ASSOCIATION,
a Michigan nonprofit corporation,

Plaintiff,

vs. Case No. 2014-1268-CH

LOTTIVUE IMPROVEMENT
ASSOCIATION, a Michigan nonprofit
corporation,

Defendant.

_____/

OPINION AND ORDER

Plaintiff Lighthouse Cove Association has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant Lottivue Improvement Association has filed a cross motion for summary disposition pursuant to MCR 2.116(C)(8) and (10).

Facts and Procedural History

Lottivue Improvement Association ("Lottivue"), formed in 1958, is a homeowners association responsible for the management and administration of the Lottivue Subdivision ("Lottivue Subdivision"). The Lottivue Subdivision, first recorded in 1956, is comprised of 194 homes, 164 of which are located along a series of canals ultimately leading to Lake St. Clair (the "Canals"). All homes in the Lottivue Subdivision are burdened by certain property-use restrictions and are required to pay annual dues; however, only the 164 canal-front homes are additionally required to pay yearly maintenance dues for the Canals.

Lighthouse Cove Association ("Lighthouse"), formed in 1987, is a condominium association responsible for the management and administration of the Lighthouse Cove

Condominium ("Condominium"). The Condominium is located directly north of the Lottivue Subdivision, and was originally developed by Socks Development Company ("Socks"). Part of the Socks development plan was to gain access to Lake St. Clair for the Condominium via the Lottivue Subdivision's main entrance canal ("Main Entrance Canal"). The Main Entrance Canal separates the southern boundary of the Condominium from the northern boundary of the Lottivue Subdivision.

On October 23, 1987, Socks and Lottivue recorded a Declaration of Restrictions ("Agreement") which granted the Condominium access rights to the Main Entrance Canal in consideration of certain property use-restrictions and Lighthouse's payment of particular dues to Lottivue.

The Agreement specifically provides the purpose of the parties' entrance into the agreement as follows:

> WHEREAS, SOCKS . . . is developing land . . . for the purpose of construction of condominium units with canal rights, permitting ingress and egress to Lake St. Clair, utilizing the . . . [M]ain [E]ntrance [C]anal; and WHEREAS, Lottivue . . . desires certain restrictions on the use of land afforded canal rights to the . . . [M]ain [E]ntrance [C]anal; . . .

The Agreement creates two yearly financial obligations for Lighthouse- namely, payment of annual dues and maintenance expenses. Under Section (i) of the Agreement, Lighthouse is required to pay Lottivue annual dues, priced at one-third of the amount of the Lottivue Subdivision homeowners' annual dues. Section (j) of the Agreement governs maintenance expenses and mandates the following:

> All assessments and maintenance expenses relating to the [M]ain [E]ntrance [C]anal separating the northern boundary of Lottivue Subdivision and the southern boundary of the condominium unit including those units planned, but not necessarily built or occupied, in which case the obligation for those units shall rest upon the Developer, shall be determined by a majority of the individuals who own condominium units and lots which belong to [] Lottivue . . . . The amount of the

> assessments and maintenance expenses relating to said [M]ain [E]ntrance [C]anal shall be shared equally by the owners of each such condominium unit and lot. Such assessments and maintenance expenses shall include, but not necessarily be limited to, dredging of the [M]ain [Entrance] [C]anal, the canal entrance pilings, lights and other such related expenses. It is understood that in the event . . . Lottivue . . . has sufficient funds to pay such assessments and maintenance expenses without actually assessing the lot owners, it may do so without reducing the obligation of the condominium unit owners, including the Developer, if applicable, to pay their portion of the total assessment and/or maintenance expense.

On April 1, 2014, Lighthouse filed its complaint in this matter. In its three-count complaint, Lighthouse states claims for: Count I - Complaint for Declaratory Relief, Count II – Injunctive Relief, and Count III – Damages for Overpayment to Lottivue. Lighthouse generally alleges that Lottivue has been improperly billing Lighthouse for the upkeep of all of the Canals, rather than just those expenses directly related to the Main Entrance Canal.

On June 13, 2014, Lighthouse filed its motion for summary disposition pursuant to MCR 2.116(C)(10). On June 16, 2014, Lottivue filed its cross motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). On July 7, 2014, both Lighthouse and Lottivue filed responses requesting that the opposing party's motion be denied.

On July 14, 2014, the Court held a hearing in connection with Lighthouse's motion and Lottivue's cross motion. At the conclusion of the hearing, the Court took the matters under advisement. The Court has reviewed the materials submitted by the parties, as well as the arguments advanced during the hearing, and is now prepared to render its decision.

Standards of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). When deciding a motion brought under MCR 2.116(C)(8), the trial court may only consider the pleadings, and must accept all well-pled

factual allegations as true and in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Id.* at 120. In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments

In support of its motion, Lighthouse contends that the plain language of the Agreement unambiguously provides that Lottivue may only charge Lighthouse for expenses directly related to the Main Entrance Canal. Therefore, by allegedly assessing Lighthouse for costs related to any of the other Canals in the Lottivue Subdivision, Lottivue allegedly has breached the Agreement.

In response to Lighthouse's motion, Lottivue first argues that Lighthouse has allegedly failed to state a claim upon which relief can be granted and thus Lottivue is entitled to summary disposition pursuant to MCR 2.116(C)(8) and/or MCR 2.116(I)(2). Specifically, Lottivue contends that Lighthouse's Complaint only requests remedies instead of alleging any cause of action and is thus fatally deficient. Lottivue further argues that Lighthouse has waived any ability to challenge the Agreement based either on the parties' course of conduct over the past 26 years and/or from statements allegedly made by Lighthouse's own president in 2012 expressing alleged satisfaction with the parties' arrangement. As proof of the Lighthouse president's

statements, Lottivue has submitted the unsworn declaration of the secretary of the Lottivue Board of Directors, Charles W. Albright IV ("Albright Declaration"). Additionally, Lottivue contends that adopting Lighthouse's interpretation of the Agreement would be illogical and inequitable, especially without a corresponding change in Lighthouse's obligations under the Agreement.

In Lottivue's cross motion for summary disposition, Lottivue asserts that Lighthouse is barred by the doctrines of both equitable estoppel and laches from bringing its claim. Lottivue contends that its charging practices have remained unchanged for the past 26 years since the Agreement went into effect. Therefore, Lottivue contends that because Lighthouse has allegedly never raised any objection in the past 26 years to the charging practices, it should be barred from doing so now.

Additionally, Lottivue argues that the plain language of the Agreement unambiguously grants it discretion in how to charge maintenance expenses and assessments to the relevant Lighthouse members and Lottivue canal-front homeowners. Lottivue does not deny that it has charged Lighthouse for maintenance expenses for Canals beyond the Main Entrance Canal, but rather contends that this practice is specifically contemplated by the Agreement. Alternatively, Lottivue contends that even if the language of the Agreement is ambiguous, evidence of the parties' intent when entering into the Agreement supports its interpretation that its discretion controls the charging practice.

In response to Lottivue's cross motion, Lighthouse asserts that neither equitable estoppel nor laches act as a bar to its complaint as it has since 2001, approximately 13 to 14 years into the Agreement, taken issue with Lottivue's charging practices. Lighthouse argues that it has not been dilatory or lacking in due diligence, but has simply been trying to resolve the dispute outside of

the court system. Lighthouse further contends that the plain language of the Agreement does not grant Lottivue discretion to charge beyond expenses related directly to the Main Entrance Canal.

Analysis

Before reaching Lighthouse's claim on the merits, the Court must first address Lottivue's contention that it is entitled to summary disposition under MCR 2.116(C)(8) due to Lighthouse's alleged failure to state a claim, and additionally must determine whether Lighthouse is barred by equitable estoppel and/or laches. Turning to Lighthouse's Complaint, the Court initially agrees with Lottivue that Lighthouse's enumerated "Counts" in its Complaint are actually requests for relief. However, to satisfy MCR 2.116(C)(8), the Court must determine "the gravamen of a party's claim by reviewing the entire claim." *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1, 9-10; 807 NW2d 343 (2011) (internal citations omitted). In its review, the Court "is not bound by a party's choice of labels." *Id.* at 9.

A review of Lighthouse's Complaint reveals that its gravamen is a breach of contract claim. "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Construction Inc*, 495 Mich 161, 171; 848 NW2d 95 (2014). It is undisputed that Lottivue and Lighthouse have entered into a written agreement, thus satisfying the first element. Pl's Compl ¶¶ 6, 7. Furthermore, the Court is satisfied that the assertions listed under the Complaint's "General Allegations" sufficiently plead that Lottivue has allegedly breached the agreement by charging for upkeep of all Canals, therefore satisfying the second element. *Id.* ¶ 9. Lastly, the damages that Lighthouse claims are the allegedly substantial overcharges which have resulted from Lottivue's alleged breach, thereby satisfying the third element. *Id.* ¶ 10. Thus, the Court finds that Lighthouse has plead

under its “General Allegations” section a breach of contract claim, and that the enumerated counts “Counts” are instead the remedies sought. Therefore, because Lighthouse Cove has indeed stated a claim for which relief may be granted, Lottivue’s motion for summary disposition pursuant to MCR 2.116(C)(8) on this ground must be denied.

As to Lottivue’s equitable estoppel defense, the Court finds that Lottivue has failed to prove that Lighthouse must be estopped. “Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Conagra, Inc v Farmers State Bank,* 237 Mich App 109, 141; 602 NW2d 390 (1999). With respect to the first element, Lottivue contends that Lighthouse induced it to believe its charging practices were acceptable based on the fact of payment for the past 26 years. This argument for acquiescence is also premised on statements allegedly made by Lighthouse’s president in 2012. The only evidence offered concerning either the regularity of Lottivue’s charging practices or the Lighthouse president’s statements is the Albright Declaration.

However, for the following reasons, the Court finds the Albright Declaration inadmissible. When considering a motion for summary disposition brought under MCR 2.116(C)(10), “[o]pinions, conclusionary [sic] denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence.” *SSC Assocs Ltd P’ship v Gen Retirement Sys of Detroit,* 192 Mich App 360, 364; 480 NW2d 275 (1991). While the Federal Courts, under 28 USC 1746, view affidavits and properly submitted unsworn declarations as equivalent, 28 USC 1746 is not controlling upon the State of Michigan. In Michigan, the only method by which an unsworn declaration may be

given the same effect as a sworn statement is by conforming to the Uniform Unsworn Foreign Declarations Act.[1]

Under the Uniform Unsworn Foreign Declarations Act, an "unsworn declaration" is defined as "a declaration or other affirmation of truth in a signed record that is not given under oath, but is given under penalty of perjury." MCL 600.2182(g). On the other hand, a "sworn declaration" is defined as a "declaration in a signed record given under oath. Sworn declaration includes a sworn statement, verification, certificate, and affidavit." MCL 600.2182(f). In order to meet the requirements of the Act, the declarant must first be "physically located outside the boundaries of the United States." MCL 600.2183. Second, pursuant to MCL 600.2186, the declaration must conform substantially to the following language:

> I declare under penalty of perjury under the laws of the state of Michigan that the foregoing is true and correct, and that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

The Act has absolutely no application to those statements made while within in the boundaries of the United States, pursuant to MCL 600.2183, or those declarations that lack the statutory language required by MCL 600.2186. The Albright Declaration does not have the any of the language required under MCL 600.2186.

Additionally, the Albright Declaration, as an unsworn declaration, also fails to conform to the proper form of an affidavit. An affidavit requires that the document be "(1) a written or printed declaration of statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Wood v Bediako*, 272 Mich App 558, 562-563; 727 NW2d 654 (2007). The

[1] *See* MCL 600.2184(1): " . . . [I]f the state if a law of this state requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements of this chapter has the same effect as a sworn declaration."

Albright Declaration, being un-notarized thus fails the third element of a properly submitted affidavit, is therefore not an affidavit. Instead, it is nothing more than an unsworn statement made under penalty of perjury. Unsworn averments do not satisfy MCR 2.116(G)(4) or (5). Therefore, the Albright Declaration is stricken in its entirety and will not be considered by the Court at this time.

At this juncture, setting aside the inadmissible Albright Declaration, Lottivue has not provided the Court with any evidence to support the assertion that Lottivue has been charging in this method for the past 26 years and that Lighthouse has knowingly acquiesced to it for the past 26 years. On the contrary, Lighthouse alleges that Lottivue only began "improperly billing" Lighthouse approximately 13 – 14 years ago. Lighthouse also contends that it has at least once raised an objection, in 2001, which creates a question of fact as to whether Lighthouse has truly been silent for the entirety of the parties' relationship since Lottivue has submitted no evidence to rebut this claim. As a result, the Court cannot begin to determine whether Lighthouse by its representations, admissions, or silence, intentionally or negligently, induced Lottivue to believe such charging practices were acceptable. *Conagra, supra*. Therefore, Lottivue has failed at this juncture to establish the first element of equitable estoppel, and the Court need not continue onto the second and third element. Accordingly, because Lottivue has not provided any evidence to support its claim, the Court finds that Lottivue is not entitled to have Lighthouse equitably estopped from contesting Lottivue's charging practices.

Lottivue next argues that Lighthouse's claims are barred by the equitable doctrine of laches. "The doctrine of laches applies where the passage of time combined with a change in condition make it inequitable to enforce a claim. The defendant must prove a lack of due diligence on the part of the plaintiff resulting in prejudice to the defendant." *City of Jackson v*

Thompson-McCully Co, LLC, 239 Mich App 482, 494; 608 NW2d 531 (2000). Lottivue's laches claim suffers from the same evidentiary deficiency as its equitable estoppel claim. At this juncture, Lottivue has not offered any admissible evidence to substantiate its claim that Lighthouse has been dilatory. Nor is there any evidence to suggest that the parties' course of conduct has either been uninterrupted for the past 26 years or has ever been the parties' course of conduct for any period of time. Again, Lighthouse's assertion that Lottivue's improper billing practices began 13-14 years ago and that it allegedly has tried to work outside of the court system creates a genuine issue of material fact as to whether Lighthouse has been sitting on its rights. Moreover, there remains a genuine issue of material fact as to what the parties' course of conduct actually is, when Lottivue began charging Lighthouse for all of the Canals, and whether Lighthouse has ever raised objection to these charging practices. Thus, at this stage, Lottivue has failed to prove a lack of due diligence on the part of Lighthouse, and accordingly Lottivue's laches defense fails.

As to Lottivue's waiver argument, it is well established that "a waiver is a voluntary and intentional abandonment of a known right." *Quality Products & Concepts Co v Nagel Precision Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). "A waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance." *Tucker & Assocs, Inc v Allied Chucker Co*, 234 Mich App 550, 564; 595 NW2d 176 (1999) (internal citations omitted). Lottivue contends that, to the extent that Lighthouse may have had the right to challenge Lottivue's charging practices, such a right has been waived since the Agreement has gone into effect, and/or from the statements allegedly made by the Lighthouse president.

There is no evidence before the Court that suggests Lighthouse ever knew from the Agreement's inception that Lottivue would charge for all of the Canals, how such charges would be computed and shared, or even whether Lighthouse had any reason to know it was being allegedly overcharged. Nor is there any evidence before the Court to suggest that Lighthouse has always acquiesced, through payment or silence, to Lottivue's charging practices. Furthermore, given that the only evidence regarding the Lighthouse president's statements is inadmissible, there is simply no evidence to suggest that there has ever been an actual abandonment of such a right by Lighthouse. Consequently, the Court cannot find that Lighthouse has waived its right to contest a breach of the Agreement at this time.

Additionally, Lottivue's reliance on *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206; 737 NW2d 670 (2007) as support for its waiver argument is misplaced. In *Bloomfield Estates*, the Michigan Supreme Court reiterated its general rule that a plaintiff will have waived his or her ability to contest a current violation of a deed restriction if in the past the plaintiff had acquiesced to other deed violations that are of an equal or more serious character. *Bloomfield Estates*, *supra* at 219. However, *Bloomfield Estates* and the law it represents are all concerning deed restriction violations of a property-use character – not of an alleged overcharging of maintenance and/or otherwise expenses. There are no allegations in the instant matter that any party has violated the property-use restrictions on the burdened land areas. Simply put, the same concerns are not present, and the comparison is not persuasive. As a result, Lottivue has not demonstrated for the Court that Lighthouse "forever waived" any challenge to Lottivue's charging practices simply because of an alleged, and as of now unsubstantiated, acquiescence for the past 26 years.

Turning now to Lighthouse's motion on the merits, "[i]n interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In Re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). "If the language of the contract is clear and unambiguous, it must be enforced as written[,]" *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012), because "an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Products*, *supra* at 375. A contract is unambiguous "however inartfully worded or clumsily arranged" when it "fairly admits but of one interpretation." *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982). On the other hand, "[a] contract is said to be ambiguous when its words may reasonably be understood in different ways." *Id.*

Lighthouse contends that the plain language of the Agreement unambiguously provides that Lottivue may only charge Lighthouse for those assessments and maintenance expenses related to the Main Entrance Canal. Lottivue, on the other hand, contends that the Agreement unambiguously grants Lottivue the discretion to charge Lighthouse for assessments and maintenance expenses for all of the Canals. Alternatively, Lottivue argues that even if the Agreement is ambiguous, the intent of the parties has been for Lottivue to charge for all Canals and Lighthouse has knowingly demonstrated such intent by its payment to Lottivue for the past 26 years.

Turning to the Agreement, Section (j), the focus of the instant litigation, generally defines Lighthouse's financial obligation for maintenance expenses in the form of a cost-sharing provision:

> All assessments and maintenance expenses relating to the [M]ain [E]ntrance [C]anal . . . shall be determined by a majority of the individuals who own

> condominium units and lots which belong to . . . Lottivue . . . . The amount of the assessments and maintenance expenses relating to said main entrance canal shall be shared equally by the owners of each such condominium unit and lot. Such assessments and maintenance expenses shall include, but not necessarily be limited to, dredging of the [M]ain [Entrance] [C]anal, the canal entrance pilings, lights and other such related expenses. It is understood that in the event . . . Lottivue . . . has sufficient funds to pay such assessments and maintenance expenses without actually assessing the lot owners, it may do so without reducing the obligation of the condominium unit owners . . . to pay their portion of the total assessment and/or maintenance expense.

As to the first sentence, it is undisputed that the Main Entrance Canal is known to both parties as the canal "separating the northern boundary of the Lottivue Subdivision and the southern boundary of the condominium unit." It is further undisputed that the charges for assessments and maintenance expenses as related to the Main Entrance Canal are to be determined by Lottivue. That is, Lottivue is granted discretion under the Agreement to determine what assessments and maintenance expenses are necessary for the Main Entrance Canal.

The second sentence indicates how Lottivue is to distribute these assessments and maintenance expenses, as related to the Main Entrance Canal, among the burdened properties – that is, these expenses are to be shared "equally" by the Lottivue canal-front homes and the Condominium owners. The third sentence is an elaboration on, and provides non-restrictive examples of, what activities or charges the parties contemplated would need to be covered in this cost-sharing provision: i.e. "dredging of the main canal, the canal entrance pilings, lights and other such related expenses." The fourth sentence provides that if Lottivue has acquired enough funding to cover the maintenance expenses on the Main Entrance Canal for the year, Lottivue may still charge Lighthouse members for the yearly contribution toward the Main Entrance Canal without charging the canal-front Lottivue properties. Read together, Section (j) unambiguously provides that Lottivue has the discretion to the determine the assessments and maintenance expenses relating to Main Entrance Canal, and that those assessments and

maintenance expenses relating to the Main Entrance Canal are to be shared equally by Lottivue and Lighthouse members.

Proceeding to the rest of the Agreement, however, it is Lottivue's contention that reading Section (n) in conjunction with Section (j), the cost-sharing provision, clearly supports Lottivue's interpretation that it is vested with the discretion to share costs for all of its Canals. Section (n) provides that "[a]ll other provisions hereof shall be read and interpreted so as to carry out the spirit and intent of these restrictions and to protect the interests of Lottivue [] and its members." The Court finds that it is unreasonable to believe Section (n) modifies Section (j) so completely as to wholly free Lottivue of the restriction of sharing only those maintenance expenses and assessments that are related to the Main Entrance Canal and thus allow Lottivue to share all the assessments and maintenance expenses for all Canals. Such an interpretation gives Lottivue unbridled discretion and renders any specific mention of the Main Entrance Canal in any part of the Agreement meaningless. The Court cannot accept Lottivue's asserted plain-language interpretation because"[c]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Moreover, the Agreement clearly makes distinctions between the Main Entrance Canal and the rest of the Canals generally. For instance, Section (h), the provision controlling the required width of the Main Entrance Canal, states specifically: "The main canal running between the southern boundary of the Lottivue Improvement Association and the southern boundary of the condominium units shall at no time be less than seventy (70) feet wide." On the other hand, Section (f) refers to the canals generally, and states that "[n]o boats shall be operated in any canal at a speed greater than three (3) miles per hour." Thus, there is a demonstrable distinction

between the Main Entrance Canals and rest of the Canals generally. Accordingly, there is therefore a distinction between charging maintenance expenses and assessments relating to the Main Entrance Canal, and charging maintenance expenses and assessments relating to all of the Canals. Only the former is unambiguously provided for in the language of Agreement. Any charges to the contrary constitute a breach of the plain-language provisions.

However, although the Court finds the Agreement patently unambiguous, there remains an unresolved material question of fact as to whether the plain language of the Agreement has been implicitly modified by the parties' affirmative conduct.[2] Specifically, whether Lottivue's alleged routine practice of consistently charging Lighthouse for the upkeep of all Canals and Lighthouse's alleged informed payment of these charges for the past 26 years, has implicitly caused such charging practices to become an unwritten controlling term of the Agreement. Viewing the evidence in a light most favorable to Lottivue, Lighthouse has submitted no evidence to rebut Lottivue's assertion that its charging practices have been the course of conduct for the past 26 years. Lighthouse's contention that it has raised an objection to the amount charged does not necessarily mean that Lighthouse has thereby raised an objection to the computation method at large – of which, it must be noted, the Court has seen no evidence. In fact, Lighthouse has not provided any evidence as to whether it has actually been overcharged, the extent of any alleged overbilling, or when the alleged overcharging actually began.

[2] In *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003), the Michigan Supreme Court held that regardless of any anti-waiver or written-modification clause, parties to a contract "are free to *mutually* waive or modify their contract." However, parties must establish this mutuality "through clear and convincing evidence of a written agreement, oral agreement, or *affirmative conduct* establishing mutual agreement to modify or waive the particular original contract." *Quality*, *supra* at 364-365 (emphasis added). Furthermore, "when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of a prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied."*Id.* at 374.

Based on the genuine issues above, the dearth of evidence both parties have submitted, and the fact that discovery is still open, the Court is convinced that the parties' motions for summary disposition must be denied without prejudice. *See Oliver v St Clair Metal Products Co*, 45 Mich App 242, 244; 206 NW2d 444 ("It is well recognized that when evidence before a trier of fact is incomplete or disputed, the matter should not be disposed of summarily.")

Conclusion

For the reasons set forth above, Plaintiff Lighthouse's motion for summary disposition pursuant to MCR 2.116(C)(10) is DENIED. Defendant Lottivue's cross motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) is DENIED. This Opinion and Order neither resolves the last pending claim nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: August 5, 2014

JCF/sr

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